No. 14,638

IN THE

United States Court of Appeals

For the Ninth Circuit

OLE FAGERHAUGH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

No. 14,638

IN THE

United States Court of Appeals

For the Ninth Circuit

OLE FAGERHAUGH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 1291 of Title 28 United States Code, Section 192 of Title 2 United States Code and Rule 37 (a) of the Federal Rules of Criminal Procedure.

STATUTE.

2 *United States Code,* Section 192.

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either

House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisoned in a common jail for not less than one month nor more than twelve months.

STATEMENT OF THE CASE.

On December 4, 1953 appellant testified before a sub-committee of the House Committee on Un-American Activities at San Francisco, California. (Tr. 40.) Appellant was asked what his present employment was and replied, "I am a warehouseman." (Exhibit 8.) The next question asked appellant was, "Where are you employed?"[1] (Exhibit 8.) Appellant refused to answer this question. (Exhibit 8.) Appellant declared he had legal reasons for refusing to answer the question. (Exhibit 8.) He said he was "not going to be a party to dragging my employer into this smear campaign". (Exhibit 8.) He informed the Committee he was going to continue to stand on his right not to answer the question. (Exhibit 8.) He stated that since the Committee was fully aware as to where he was employed he didn't see any purpose in answering the question. (Exhibit 8.) Appellant was

---

[1]The transcript (Exhibit 8) of the Committee hearing, insofar as pertinent here, is included in the appendix to appellant's brief.

then directed to answer the question. (Exhibit 8.) Thereafter, he stated that he did not feel that the answer to the question or any answer he might give at the hearing might incriminate him. (Exhibit 8.)

Representative Jackson, in the House of Representatives debate on the resolution to cite appellant for contempt, indicated that the Committee felt that the answer to the question of appellant's place of employment was pertinent for proper identification and to determine where Communist Party members were placed in industry throughout the country. (Exhibit 7; Tr. 24.)

In the report of the Committee on Un-American Activities it was submitted that appellant refused to answer a question pertinent to the subject under inquiry by a sub-committee of the Committee on Un-American Activities and that his refusal to answer the question deprived the Committee of necessary and pertinent testimony and placed the witness in contempt of the House of Representatives of the United States. (Exhibit 7; Tr. 22.) The Speaker of the House of Representatives certified this report to the United States Attorney for proceedings against appellant in the manner and form provided by law. (Exhibit 7; Tr. 22.)

On July 15, 1954 appellant was indicted for a violation of Section 192 of Title 2 United States Code for refusing to answer the question where he was then employed. (Tr. 3, 4.) Appellant's motion to dismiss the indictment was denied by United States District Judge Edward P. Murphy. (Tr. 30.) On October

14, 1954, after waiver of a jury trial, appellant was tried by the Court, the Honorable O. D. Hamlin presiding. (Tr. 33.) After evidence was introduced on the part of the government and appellant, the Court found the appellant guilty stating as follows (Tr. 125-127):

> "The defendant in this case is charged with having refused to answer a pertinent question before a duly created subcommittee of the Committee Upon Un-American Activities of the House of Representatives of the United States.
>
> The question asked of the defendant was, 'Where are you employed?'. The defendant based his refusal to answer this question upon the Fifth Amendment, which declares in part that no person shall be compelled in any criminal case to be a witness against himself.
>
> The privilege afforded extends not only to answers that would in themselves support a criminal prosecution under a federal criminal statute, but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute the claimant for a federal offense. The cases hold that this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The cases hold that the entire setting must be taken into consideration in determining whether the constitutional guaranty is validly invoked.
>
> In the present case I have examined the transcript of the evidence before the Committee, have heard the evidence in this case, and have read the briefs filed by counsel. It is apparent to the

Court that in this matter the defendant could not possibly have any fear of prosecution by his answering the question as to where he was employed.

At the time of the hearing the defendant himself stated that one reason why he refused to answer the question was 'because the Committee is fully aware of where I am employed and I don't see any purpose.' Later the defendant again said, when asked about his place of employment, 'I am not going to be a party to dragging my employer into this smear campaign.'

Again, later, he was asked, 'Are you employed at the Illinois Glass Company, so that the record will state it correctly,' and the defendant again refused to answer the question upon the same ground.

Under all the circumstances of the case I am satisfied that the defendant had no reasonable cause to apprehend danger from a direct answer to the question. In fact, the defendant himself at the hearing stated that he did not believe that the answer would incriminate him.

The Court believes that his failure to answer the question, and to answer a pertinent question, was wilful and contemptuous.

There is another matter to be determined, and that is whether the offer of the defendant at the start of this case to answer the question previously addressed to him by the Committee purged the contempt. Counsel has presented to me no cases or law indicating that a contempt such as we have in this matter can thus be purged, and the Court finds that it cannot be so purged.

Therefore, the Court finds the defendant guilty of the charge set forth in the indictment."

Appeal was timely made to this Court. (Tr. 32.)

QUESTIONS PRESENTED.

1. Was appellant entitled to the privilege?
2. Was appellant directed to answer the question?
3. Did appellant waive any right to the privilege?

SUMMARY OF ARGUMENT.

I. APPELLANT WAS NOT ENTITLED TO THE PRIVILEGE.

A witness' say-so does not of itself establish the hazard of incrimination. It is not enough that answers to anticipated later questions might incriminate.

Here, the question asked was innocent on its face. The burden was on appellant to come forward with some sort of showing that the answer might incriminate him. This he did not do. All he claimed was that the answer might involve a third person and that he didn't see any purpose to the Committee's question since they already knew the answer. Furthermore, he himself declared that he didn't feel that the answer might incriminate him. The uncontradicted evidence was that appellant wilfully and contemptuously refused to answer the question and claimed the privilege against self-incrimination in bad faith.

II. APPELLANT WAS DIRECTED TO ANSWER THE QUESTION.

After being asked the question "Where are you employed?", appellant gave various reasons for refusing to answer. He claimed that he had a legal right not to answer, and said that he was going to stand on that right.

Quinn v. United States, 349 U.S. 155, holds that if objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected by the committee.

Under the recent decisions of the Supreme Court the Committee was required to interpret appellant's rather vague language in favor of the privilege. Appellant thereafter was specifically directed to answer the question. In the cases recently decided by the Supreme Court this direction to answer was not present. There is no evidence in the record that appellant was under any misapprehension as to the disposition of his objection by the Committee. In the absence of any showing by appellant, this Court should not so find now.

III. APPELLANT WAIVED THE PRIVILEGE.

Appellant claimed the privilege against self-incrimination after first answering questions concerning the nature of his employment. He may not select his own stopping place in the testimony. After testifying to a portion of the facts concerning his

employment, he cannot decide to withhold those facts he feels might embarrass third parties unless some showing is made that the answers to the questions might involve different consideration than the one he has already given. No such showing is made here. The claim of privilege was a pure afterthought. It was made only after appellant disclosed his real reasons for declining to answer. This reason was untenable. This case is indistinguishable from the case of *Rogers v. United States,* 340 U.S. 367. Here, as there, appellant has waived any right to the privilege.

ARGUMENT.

I. APPELLANT WAS NOT ENTITLED TO THE PRIVILEGE.

The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. *Hoffman v. United States,* 341 U.S. 479, 486; *Miller v. United States* (9th Cir.), 95 F. 2d 492. To support the claim of privilege the danger must be real, not remote or fanciful. It must appear that an answer to a question may disclose a fact which will supply a link in the chain of evidence which is necessary to establish the commission of a crime by the witness. *Mason v. United States,* 244 U.S. 362; *Blau v. United States,* 340 U.S. 159; *Hoffman v. United States,* supra. The witness must have reasonable cause to apprehend danger from a direct answer. *Mason v. United States,* supra; *Hoffman v. United States,* supra. When ques-

tions do not on their face appear to call for an answer which would tend to incriminate, it is incumbent upon the witness to justify his refusal to answer on the ground claimed by making it appear that his assertion that the answer would tend to incriminate was based upon substantial reasons so to believe and was not made to merely protect some other person or persons. *United States v. Rosen*, 174 F. 2d 187, 188; *Counselman v. Hitchcock,* 142 U.S. 547; *Brown v. Walker,* 161 U.S. 591; *United States v. Zwillman,* 108 F. 2d 802; *United States v. Weisman*, 111 F. 2d 260; *United States v. Cusson*, 132 F. 2d 413. It is not enough that answers to anticipated later questions might incriminate. *Camarota v. United States,* 111 F. 2d 243.

It may be argued that if the witness is required to show how the answer might incriminate him the privilege would be destroyed. On the other hand, if a mere claim by a witness of the privilege is sufficient, the government will be denied relevant evidence in cases where a refusal to answer the question was based not on a real fear of incrimination but out of contempt of the tribunal or a desire to protect others. As Chief Justice Marshall said in the *Burr* treason case (*In re Willie,* F. Cas. No. 14692e), "When two principles come in conflict with each other, the Court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can

neither of them be entirely disregarded." The only practical solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available. *United States v. Weisman,* 111 F. 2d 261.

A. The question was innocent on its face.

It is, of course, possible to conceive of instances where an answer to the question "Where are you employed?" would in fact be incriminating. The question here, however, must be examined in its setting. Appellant was a warehouseman at the Illinois Glass Company. He was aware that the committee knew of his place of work. His employer testified at the trial that he was that which he claimed at the hearing—a warehouseman—no more and no less. Appellant, immediately before refusing to answer the question, stated the nature of his employment, and any inference of an illegal business is not in the case. Appellant himself stated the real reason for his refusal to answer, declaring that he was not going to drag his employer into the hearing, and that he did not see the purpose to the question. Appellant argues that the answer to the question might subject appellant to prosecution under the Smith Act. He infers this danger from the fact that the House Committee was investigating Communist activities and particularly Communist infiltration into industry. He chooses to neglect the avowed purpose of the Committee which was to inquire into the possibility

of *enacting* legislation for the purpose of protecting industry from Communist infiltration. Any prosecution which might be instituted on the basis of future legislation enacted pursuant to recommendation of this Committee would be, as far as appellant's present activities are concerned, barred as "ex post facto".

The Smith Act, as it presently reads, has nothing to do with employment as such. Appellant might very well have advocated the overthrow of the government of the United States by force. The fact he worked in a glass factory, however, could not conceivably be a link in the chain of evidence of a successful prosecution for this crime. Appellant has contented himself with merely listing all the statutes he could discover which involve subversion or Communist activities. It must be remembered that appellant was not employed in the making of atomic bombs. He was in fact a warehouseman, and it appeared to the Committee through his own testimony that he was merely a warehouseman. Any assumption that appellant could reasonably apprehend danger from the question here asked would be based on speculation and conjecture.

The government does not need to argue that appellant in fact was not a subversive. Perhaps he was and is. The answer to the question here, however, would not furnish evidence or leads to prove that fact. As stated before, the fact that answer to anticipated later questions might incriminate is not sufficient to excuse a refusal to answer innocent questions. *Camarota v. United States,* supra.

When appellant was asked concerning his Communist activities and associates, he had a right to refuse to answer the question, but when he was asked questions for the purpose of identifying himself for the record, he had no such right. There was ample evidence for the Court below to conclude that the question asked in light of its setting could not reasonably have tended to incriminate appellant.

B. Appellant did not justify his refusal to answer.

Since the question was innocent on its face, the burden was on appellant to come forward with some sort of showing that the answer might incriminate him. *United States v. Weisman*, supra; *United States v. Rosen,* supra. Appellant need not have proved this fact by a preponderance of evidence or beyond a reasonable doubt. However, he was required to make some showing to give at least a clue from which a reasonable man could gain some inkling of a reasonable danger that was not fanciful, conjectural or speculative. At the hearing he mentioned a number of reasons why, in his opinion, an answer could not be required. He stated, ". . . the committee is already fully aware of where I am employed, and I don't see any purpose . . ." He stated, "I am not going to be a party to dragging my employer into this smear campaign." He stated, "I don't feel that that answer or any answer I might give here might incriminate me. I have committed no crime. I am guilty of no crime, and I have nothing to fear . . ."

It should be evident that none of the reasons given by appellant were sufficient to make it evident that a

reasonable danger of a tendency to incriminate existed from an answer to the question. Quite the reverse is true. Appellant fully demonstrated at the hearing that he had no fear whatever of giving an incriminating answer; that his reasons for declining to answer were to protect his employer and to wilfully defy the Committee. He had set himself up as a judge over the propriety of the Committee's questions and investigation.

Appellant introduced some evidence at the trial of his case. An examination of this evidence does not supply any probability that the answer would have been incriminating. Appellant limited himself to the introduction of newspaper articles. No showing was made that appellant had even read them. He did not take the stand. He introduced no competent evidence which by any stretch of the imagination would change the color of the obviously innocent question asked to one from which he could reasonably apprehend danger. Leaving aside the question of whether or not a showing made before the trial Court would supply that which was lacking at the hearing itself, nothing was shown from which the trial Court could conclude other than it did conclude that appellant wilfully and contemptuously refused to answer the question.

From the evidence in the Court below it must be concluded that appellant could not reasonably apprehend that the answer to the question "Where are you employed?" could furnish a link in the chain of evidence needed to prosecute him for a federal crime. The only evidence presented was that appellant de-

liberately and contemptuously refused to answer a question of a sub-committee of the Congress of the United States. An examination of the hearing transcript can produce no other conclusion than that appellant claimed the privilege against self-incrimination in bad faith. The privilege against self-incrimination is a valuable safeguard of liberty. This Court should not allow it to be perverted and abused. The privilege cannot be allowed as a shield for contemptuous exercise of the privilege itself.

In the last analysis, the issue before this Court is whether or not there was sufficient evidence in the Court below for Judge O. D. Hamlin's decision that there was no reasonable cause for appellant to apprehend danger from the question asked. This Court has heretofore held "that where any evidence as to the probability of the incriminating nature of an answer is not before it, an Appellate Court may indulge in the presumption that the evidence justified the trial Court's conclusion that there was no such reasonable probability." *Graham v. United States* (9th Cir.), 99 F. 2d 746.

II. APPELLANT WAS DIRECTED TO ANSWER THE QUESTION.

Appellant was asked the question involved here a number of times. He gave various reasons for refusing to answer the question. He claimed that he had a legal right not to answer it and said that he was going to stand on that right. Appellant chooses to interpret the record as indicating that appellant's first so-called

legal objections were not on the ground of the privilege against self-incrimination. The Supreme Court, however, has recently held that ". . . If an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected both by the committee and by a Court in a prosecution under Section 192." *Quinn v. United States,* 349 U.S. 155, 162-163.

Appellant claimed he had a right not to answer the question. The only right he had was the right to invoke the privilege against self-incrimination. The Committee could, and was required, to interpret his rather vague language in favor of the privilege. The dissenting judges in the *Quinn* case pointed out the meager evidence upon which the majority found that a claim of privilege was made there. Under the *Quinn* and *Emspak* opinions, 349 U.S. 190, the Committee could not do less than to construe appellant's statements as an attempt to claim the privilege against self-incrimination.

The Supreme Court in *Bart v. United States,* 349 U.S. 219, 222, specifically held that a direction to answer the question informed the accused of the Committee's position. It was said in the majority opinion in the *Quinn* case, at page 170, that ". . . the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection."

Here the Committee, after hearing argument by appellant after appellant had conferred with counsel, directed him to answer the question and asked it

again. Mr. Fagerhaugh again declined to answer the question on the ground of his right under the Fifth Amendment. He was asked the question in another way and refused to answer again. While it would possibly have been clearer for the Committee to phrase its overruling of petitioner's objection to the question in the manner required in a Court of law, the Supreme Court recognizes that that is not required. *Quinn v. United States,* supra, at page 170; *Bart v. United States,* supra, at page 222.

Appellant was specifically directed to answer the question after claiming the right not to answer it, and he was asked the question again after refusing to answer it. Appellant could have been under no misapprehension as to the disposition of the Committee with respect to his objection. In the Court below he introduced no evidence to show that he was in fact under any misapprehension as to the disposition of his objection by the Committee. The only evidence before the Court below was that he wilfully and contemptuously refused to answer the question, and that his claim of privilege was made in bad faith. In the absence of evidence that he did not understand that his claim was overruled, criminal intent was not negated as was the case in the *Quinn* and *Emspak* cases.

In none of the three cases decided by the Supreme Court was the defendant directed to answer the question. Here, Mr. Velde, the Chairman of the Committee, not only directed appellant to answer the question but asked it again, and to leave no doubt

whatever on that score, the counsel for the Committee repeated the question in another form when appellant once again declined to answer.

III. APPELLANT WAIVED THE PRIVILEGE.

In *Rogers v. United States,* 340 U.S. 367, the defendant refused to identify a person to whom she had given Communist Party books, after she had first testified that she had herself previously been in possession of the books, stating "I don't feel I should subject a person or persons to the same thing that I'm going through." (at page 368). Thereafter she claimed that an answer to the question might incriminate her. The Supreme Court held that the claim of privilege was pure afterthought and that petitioner had waived her privilege of silence (at page 371).

Appellant argues that Courts look with disfavor upon the contention that the privilege against self-incrimination be waived. There has been no intimation, however, that the principle of the *Rogers* case has been overruled. In the instant case appellant first gave the nature of his employment and then refused to answer the question where he was employed. He placed his refusal to answer upon an untenable ground. Just as in the *Rogers* case, he refused to answer because in his opinion an answer might involve a third party. In the instant case, as in the *Rogers* case, the claim of self-incrimination was "a pure afterthought". Appellant argues that

although petitioner did not feel that an answer to the question would incriminate him his counsel thought otherwise and upon his advice the privilege was claimed. A reading of the record, however, will demonstrate that appellant conferred with counsel before giving any of his answers to the question. When the question was first asked appellant conferred with his counsel, Mr. Treuhaft. After conferring with counsel appellant gave his objections to answering the question. They were that he had a legal right not to answer the question, that the Committee was fully aware of where he was employed, that he didn't see any purpose, that he would rather the Committee enter the fact into the records from their own records, and that he was not going to be a "party to dragging my employer into this smear campaign." After again conferring with counsel appellant declined to answer the question on the ground of his rights under the Fifth Amendment. Immediately thereafter he declared that he did not feel that the answer to the question might incriminate him.

In the instant case appellant testified as to the nature of his employment. The mere detail of where that employment took place presents no more than "a mere imaginary possibility of increasing the danger of prosecution." *Rogers v. United States,* supra, at page 375. Appellant had already testified concerning what his activities were. He refused to testify as to where that activity took place not out of fear of prosecution but out of contempt of the Committee and to protect someone else. Appellant seeks to dis-

tinguish between the *Rogers* case and the instant one by arguing that Fagerhaugh had answered only routine questions as to identification before refusing to answer the question as to where he was employed. The question he refused to answer, however, was but another routine question of identification. The answer he refused to give would no more incriminate than the ones he in fact gave.

Appellant also attempts to distinguish the *Rogers* case by contrasting the culpable nature of the answer "I am treasurer of the Communist Party of Colorado" to the answer "I am a warehouseman." We admit, of course, that the *Rogers* answer was the more incriminating than the one here, this because the answer "I am a warehouseman" was not incriminating at all. The question which Rogers refused to answer also asked for incriminating material while the question in the Fagerhaugh case did not.

In our opinion appellant misconceives the principle in the *Rogers* case. The *Rogers* case held that the witness may not select how far he will go in testifying concerning a single subject matter. As the Court said, "To uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." (at page 371). Here appellant had testified concerning the subject of his employment. He in effect told the Committee that he would testify concerning his employment as to those facts he desired the Committee to know and would refuse to testify as to those facts he did not desire the Com-

mittee to know. Appellant "opened the door" to questions concerning his employment when he testified concerning its nature. Conceivably he could have refused to testify concerning his employment at all. His employment might have involved illegal activities. However, this possibility was taken out of the case when he testified his employment was as a warehouseman. He might have been justified in refusing to answer any questions concerning other employment he might have, but as to employment as a warehouseman he had waived all objections unless, of course, he showed some special circumstances which would make it evident that some possibility of incrimination existed.

Furthermore, by declaring that he did not feel that any answer he gave might incriminate him, appellant removed any basis for his claim of privilege. He waived the privilege by stating that it did not apply to him. One may not claim the privilege spaciously. The privilege may not be claimed without reason. Appellant in effect told the Committee that he was not in the class of persons who are entitled to the privilege. By so doing he waived his right, if any, to hide behind the privilege's shield.

Appellant argues that the privilege was not at first claimed by appellant. He states that appellant first declined to answer the question on other grounds and thereafter declined on the ground of the privilege. If appellant is correct, the claim of the privilege is then that "pure afterthought" condemned by the *Rogers* case. Appellant is on the horns of a dilemma.

If he argues that the privilege was claimed when the question was first asked, then it is clear that the objection was specifically overruled and he cannot take advantage of the *Quinn* and *Emspak* cases. If he argues that the privilege was not claimed until after appellant gave his real reasons for not answering the question, he comes within the rule prohibiting the claim of privilege when that claim is "a pure afterthought".

CONCLUSION.

The instant case is a very simple one. It involves the use of the privilege against self-incrimination in bad faith. Appellant used the privilege to show his contempt for the Committee. No Court has ever justified this kind of use of the privilege. This Court should not do so now. The judgment should be affirmed.

Dated, San Francisco, California,
September 15, 1955.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.